88-560

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Theresa F. Mitan, Appellant

v.

Frank J. Mitan

On Appeal From The Michigan Supreme Court

JURISDICTIONAL STATEMENT

Appellant, Pro Se:
Theresa F. Mitan
30943 Club House Lane
Farmington Hills, MI 48018

September, 1988

38 pp

QUESTION PRESENTED

The ultimate question presented is whether the courts of the State of Michigan acting pursuant to Section 552 of the Michigan Compiled Laws Annotated may deprive a party of her rights under the U.S. Bankruptcy Code and the Fourteenth Amendment to the United States Constitution.

This ultimate question involves, among others, the following subsidiary questions:

1. Do prior holdings of this Court prohibit the courts of the State of Michigan acting pursuant to Chapter 552 of the Michigan Compiled Laws Annotated from making determinations of core bankruptcy proceedings specified in 28 U.S.C. Section

157(b)(2)(B) and 28 U.S.C. 157(b)(2)(I) without consideration of Title 11 of the United States Code?

2. Do 11 U.S.C. Section 727(b) and 11 U.S.C. Section 1141(d) prohibit the courts of the State of Michigan acting pursuant to Chapter 552 of the Michigan Compiled Laws Annotated from creating a class of non-dischargeable debts not within the legislative exceptions to discharge expressed in 11 U.S.C. Section 523?

3. Does 11 U.S.C. Section 522(c) prohibit the courts of the State of Michigan acting pursuant to Chapter 552 of Michigan Compiled Laws Annotated from authorizing a creditor's execution upon property based upon an unsecured debt that arose before the filing of the

bankruptcy petition, even if the debt has been declared not discharged on grounds other than 11 U.S.C. Section 523(a)(1) or 11 U.S.C. Section 523(a)(5), if the property has been exempted under 11 U.S.C. Section 522(d)(10)(D), specifically in light of 11 U.S.C. Section 522(e)?

4. Does the Fourteenth Amendment to the United States Constitution prohibit the courts of the State of Michigan acting pursuant to Chapter 552 of the Michigan Compiled Laws Annotated from binding a party to a judgment which it entered in compliance with an alleged settlement, without providing that party with an opportunity for a hearing in which she could present evidence that she did not agree to the alleged settlement, especially if that party did not, in

fact, agree to the alleged settlement.

All of the parties appearing in the Michigan Supreme Court are listed in the caption.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	v
Opinions Below	2
Jurisdiction	3
Constitutional And Statutory Provisions Involved	7
Statement	8
Substantiality Of The Federal Question	16
Conclusion	28

The Appendices Are Separately Bound.

TABLE OF AUTHORITIES

CASES:

Baltimore & O. R. Co. v United States, 298 U.S. 349, 80 L. Ed. 1209, 56 S. Ct. 797 (1935).	26

Fuentes v Shevin, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, 10 UCCRS 913 (1972), reh den 409 U.S. 902, 34 L. Ed. 2d 165, 93 S. Ct. 177 25

In Re LaMarre, 494 F. 2d 753 (1974) 25

International Shoe Co. v Pinkus, 278 U.S. 261, 73 L. Ed. 318, 49 S. Ct. 108 (1928) 18

Lindsey v Normet, 45 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972) 27

Northern Pipeline Co. v Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 6 C.B.C. 2d 785 (1982) 16

Ohio v Kovacs, 469 U.S. 274, 83
L. Ed. 2d 649, 105 S. Ct. 705
(1985) 21

Williams v United States
F. & G. Co., 236 U.S. 549, 59
L. Ed. 713, 35 S. Ct. 289
(1914) 23,24

Wright v Union Central
L. Ins. Co., 304 U.S. 502, 82
L. Ed. 1490, 58 S. Ct. 1025
(1938), reh den 305 U.S. 668,
83 L. Ed. 433, 59 S. Ct. 56... 17,18

CONSTITUTIONAL PROVISIONS:
United States Constitution,
Article 1, Section 8,
Clause 4 17

United States Constitution,
Article 1, Section 8,
Clause 18 18

United States Constitution,
Fourteenth Amendment 25

FEDERAL STATUTORY PROVISIONS:
11 United States Code
Section 522(c) 22,23

11 United States Code
Section 522(d)(10)(D) 22,23

11 United States Code
Section 522(e) 23

11 United States Code
Section 523 20,22

11 United States Code
Section 727(b) 20,21

11 United States Code

Section 1141(d) 20,21

28 United States Code

Section 1257(2) 6

28 United States Code

Section 1334(b) 16

IN THE

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October Term, 1988

No. _____

Theresa F. Mitan, Appellant

v.

Frank J. Mitan

On Appeal From The Michigan Supreme Court

JURISDICTIONAL STATEMENT

Appellant appeals from the final order of the Michigan Supreme Court, entered June 28, 1988, denying Appellant's Application For Leave To Appeal, effectively affirming the Judgment of the Circuit Court for the County of Oakland, State of Michigan.

OPINIONS BELOW

The December 10, 1987 opinion of the Michigan Court of Appeals (App. B, B1 - B-9) was not officially reported. The Supreme Court of Michigan issued no opinion.

JURISDICTION

This is an appeal from a final order of the Michigan Supreme Court (App. A, A-1 - A-3).

On November 20, 1985, over the objections of Appellant, the Circuit Court for the County of Oakland, State of Michigan, entered a Judgment Of Absolute Divorce (App. C, C-1 - C-3). The entry of the Judgment Of Absolute Divorce was based upon an earlier settlement by the parties. Appellant objected because the terms of the Judgment Of Absolute Divorce, as entered, differed from the terms of the earlier settlement. The court did not hold an evidentiary hearing or make any findings of fact.

One of the changes allowed Appellee to collect on an indemnity obligation from Appellant in the event that Appellant filed voluntary bankruptcy, by a set-off against Appellee's alimony obligation to Appellant.

On December 5, 1985, Appellant filed a "Motion To Reconsider Order Entering Judgment Of Absolute Divorce And To Amend Judgment Of Absolute Divorce" in the Circuit Court of the County of Oakland, (App. I, I-1 - I-9) contesting the validity of the alimony set-off provision and the other changes.

On January 8, 1986, the Circuit Court of the County of Oakland entered an "Order Denying Motion To Reconsider Order Entering Judgment Of Absolute

Divorce And To Amend Judgment Of Absolute Divorce" (App. D, D-1 - D-3) denying Appellant's motion.

On January 8, 1986, Appellant filed a Claim of Appeal with the Michigan Court of Appeals (App. F, F-1 - F-3), contending that the alimony set-off provision deprived Appellant of her rights under the United States Bankruptcy Code and that the changes made were invalid because Appellant had not agreed to them and had not been given an evidentiary hearing.

On December 10, 1987, the Michigan Court of Appeals issued an opinion affirming the Judgment Of Absolute Divorce entered by the Circuit Court for the County of Oakland (App. B, B-1 - B-9).

On January 4, 1988, Appellant filed an Application For Leave To Appeal with the Michigan Supreme Court (App. E, E-1 - E-13), again contending that the alimony set-off provision deprived Appellant of her rights under the United States Bankruptcy Code and that changes made were invalid because Appellant had not agreed to them and had not been given an evidentiary hearing.

On June 28, 1988, the Supreme Court of Michigan entered an Order denying Appellant's Application For Leave To Appeal (App. A, A-1 - A-3).

This court has jurisdiction of this appeal by virtue of U.S. 28 U.S.C. Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution, Sections 522(c), 522(d)(10)(D), 522(e), 523, 727(b), and 1141(d) of Title 11 of the United States Code, and Section 157(b)(2)(B), 157(b)(2)(I), and 1334(b) of Title 28 of U.S. Code are set forth in Appendix J, J-1 to J-26.

STATEMENT

This is a divorce action involving a marriage of over 33 years. On June 11, 1985, the parties placed an oral settlement on the record. Both parties stated on the record that they agreed to the settlement, that they thought it was fair, and that they would be bound by it.

Subsequently, Appellee refused to agree to a written judgment incorporating the settlement of June 11, 1985, and claimed there were remaining issues to be resolved. The parties stipulated in writing that the "remaining issues" would be resolved by binding mediation.

Unfortunately, the mediator not only resolved the remaining issues, but

also made changes to the June 11, 1985 settlement.

On November 20, 1985, The Circuit Court for the County of Oakland, State of Michigan, pursuant to Chapter 552 of the Michigan Compiled Laws Annotated, entered a Judgment of Absolute Divorce (App. C, C-1 - C-43) over the objections of Appellant. Appellant objected that the terms of the judgment did not comply with the terms of the settlement earlier reached by the parties, because of changes made by the mediator which Appellant had not agreed to. Nevertheless, the court entered the judgment without taking any testimony whatsoever, without reviewing the mediation transcipt, and without making any findings of fact that the judgment had been agreed to by both

parties.

On December 5, 1985, Appellant filed a "Motion To Reconsider Order Entering Judgment of Absolute Divorce and To Amend Judgment Of Absolute Divorce" (App. I, I-1 - I-9) specifying the changes made to the Judgment of Absolute Divorce and the reasons Appellant would not agree to them.

The second sentence of Paragraph 10 of the Judgment of Absolute Divorce states as follows: "In the event that plaintiff shall declare voluntary bankruptcy so that her obligation hereunder shall be eliminated or diminished then, in said event, the defendant shall have a right to set-off against his obligation to pay alimony the amount of said deficiency

plaintiff." (App. C, at C-9). Paragraph 15 of Appellant's "Motion To Reconsider Order Entering Judgment Of Absolute Divorce And To Amend Judgment Of Absolute Divorce" objected to the second sentence of Paragraph 10 of the Judgment of Absolute Divorce on the ground that it would deprive Appellant of her rights under federal Bankruptcy law (App. I, at I-7).

On January 8, 1986, the Oakland County Circuit Court issued an "Order Denying Motion To Reconsider Order Entering Judgment Of Absolute Divorce And To Amend Judgment Of Absolute Divorce" (App. D, D-1 - D-3). The trial court again did so without taking any testimony whatsoever, without reviewing the mediation transcript, and without making any

findings of fact that the judgment had been agreed to by both parties.

On January 8, 1986, Appellant filed a Claim of Appeal with the Michigan Court Of Appeals (App. F, F-1 - F-3).

In the Statement of Questions Involved in the Brief of Appellant-Plaintiff Theresa F. Mitan in the Michigan Court Of Appeals (App. H, H-1 - H-2), Appellant specifically raised Question IV: "May A State Court Judge In A Divorce Proceeding Deprive A Party Of Her Rights Under The Bankruptcy Code of 1978?" (App. H, at H-2). In that same Brief, Appellant claimed that she had a right to, and had been deprived of, an evidentiary hearing.

The Michigan Court of Appeals issued an opinion on December 10, 1987 (App. B, B-1 - B-9) which held that changes had been made to the terms of the June 11, 1985 settlement and that Appellant had, based upon the facts, agreed to the terms of the judgment as changed (App. B, at B-5 - B-6). The Court of Appeals did so without taking any testimony whatsoever. This factual finding was based solely upon a review of the mediation transcript. This mediation transcript was never even admitted into evidence by the trial court.

In its opinion, the Michigan Court of Appeals also stated "We decide only that, insofar as the laws of this state are concerned, it is proper for the parties to attach conditions to

plaintiff's entitlement to periodic alimony." (App. B, at B-8 - B-9).

On January 4, 1988 Appellant filed an "Application For Leave To Appeal" with the Michigan Supreme Court (App. E, E-1 - E-13). In the Statement of Questions Presented in Appellant's Brief In Support of Application For Leave To Appeal to the Michigan Supreme Court (App. G, G-1 - G-2), Appellant specifically raised Question III: "Did the Court Of Appeals Clearly Err In Affirming The Deprivation Of A Party To A Divorce Proceeding's Rights Under The Bankruptcy Code of 1978 By A State Court Judge?" (App. G, at G-2). In that same Brief, Appellant claimed that she had a right to, and had been deprived of, an evidentiary hearing.

On June 28, 1938, the Michigan Supreme Court entered an Order Denying Appellant's Application For Leave To Appeal (App. A, A-1 - A-3).

SUBSTANTIALITY OF THE FEDERAL QUESTION

1. In Northern Pipeline Co. v Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 6 C.B.C. 2d 785 (1982), this Court declared 28 U.S.C. Section 1471 unconstitutional. That case involved a matter of state law being brought before a non-Article III bankruptcy judge. The instant case involves the opposite situation. In this case, matters of the federal bankruptcy law are being decided by state courts.

28 U.S.C. Section 1334(b), enacted on July 10, 1984, grants the U.S. District Court original but not exclusive jurisdiction of proceedings under Title 11 or arising in cases under Title 11. The non-exclusive

jurisdiction of the U.S. District Court permits the state courts to have jurisdiction of proceedings arising under Title 11 or arising in cases under Title 11.

It is Appellant's position that state courts, in exercising jurisdiction over proceedings arising under Title 11 or arising in cases under Title 11, must apply the law of Title 11.

Congress has the power to establish uniform bankruptcy laws throughout the United States, according to Article 1, Section 8, Clause 4 of the United States Constitution. This power must be considered along with the power of Congress to make all laws which may be necessary and proper for carrying into execution its foregoing powers,

pursuant to Article 1, Section 8, Clause 18 of the United States Constitution. Wright v. Union Central L. Ins. Co., 304 U.S. 502, 82 L. Ed. 1490, 58 S. Ct. 1025 (1938), reh den 305 U.S. 668, 83 L. Ed. 433, 59 S. Ct. 56.

To allow state courts to make decisions in proceedings arising under Title 11 or arising in cases under Title 11, without consideration of the bankruptcy laws that Congress has enacted in Title 11, is clearly impermissible. "States may not pass or enforce laws to interfere with or compliment the Bankruptcy Act, or to provide additional or auxiliary regulations." International Shoe Co. v Pinkus, 278 U.S. 261, 265, 73 L. Ed. 318, 49 S. Ct. 108 (1928).

2. As part of the Judgment of Absolute Divorce entered on November 20, 1985, the state trial court entered the second sentence of Paragraph 10, which provides as follows:

"In the event the plaintiff shall declare voluntary bankruptcy so that her obligation hereunder shall be eliminated or diminished then, in said event, the defendant shall have a right to set-off against his obligation to pay alimony the amount of said deficiency that is attributable to the plaintiff." (App. C, at C-9) This clause provides for a means of payment of the indemnity obligation created in the first sentence of Paragraph 10 of the Judgment of Absolute Divorce (App. C,

at C-8 - C-9) in the event that Appellant files bankruptcy. This is a clear attempt to reinstate an obligation in the event that it is discharged by bankruptcy.

This obligation is not an obligation which is excepted from discharge under 11 U.S.C. Section 523. To allow this obligation to be not discharged, without being within the exceptions to discharge legislated by Congress in 11 U.S.C. Section 523, allows the state court to create a new class of non-dischargeable obligations. 11 U.S.C. Section 727(b) and 11 U.S.C. Section 1141(d) provide that obligations, other than those excepted from discharge by 11 U.S.C. Section 523, are discharged. The creation of a new class of non-dischargeable obligations by a

state court clearly violates the intent of Congress in 11 U.S.C. Section 727(b) and 11 U.S.C. Section 1141(d).

This Court in Ohio v Kovacs, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985), unanimously upheld the right of a debtor to receive a discharge, despite a state's intention to the contrary. In the instant case, the state court had other means to insure payment of the obligation. It had the power to grant a lien on Appellant's property, pursuant to the Judgment of Absolute Divorce, to require Appellant's payment of the obligation. It did not have to interfere with Appellant's discharge.

Moreover, no one has contended that Appellee will not be able to seek an alimony reduction, under state law, based upon the changed financial position of Appellee, if Appellant defaults on this obligation.

3. Even if an obligation is not discharged pursuant to 11 U.S.C. Section 523, Congress has prohibited that creditor from executing upon the debtor's exempt property except in certain circumstances. 11 U.S.C. 522(c).

The state court, through the second sentence of Paragraph 10 of the Judgment of Absolute Divorce, has created another type of debt which, if not discharged, may be collected from Appellant's exempt property, exempted pursuant to 11 U.S.C. Section

522(d)(10)(D). This clearly conflicts with the intent of Congress expressed in 11 U.S.C. Section 522(c).

The Michigan Court of Appeals held the clause in question valid because it found that Appellant had agreed to it (App. B, at B-8). Appellant has repeatedly contested, and continues to contest, that she agreed to this provision. However, Congress in 11 U.S.C. Section 522(e), a section which was raised before the Michigan Court of Appeals, has specifically decided the outcome in the event of such an agreement. That section makes a waiver of an exemption unenforceable.

The purpose of the Bankruptcy Act is to permit the debtor to have a fresh start free from her obligations. Williams v United States F. & G. Co.,

236 U.S. 549, 59 L. Ed. 713, 35 S. Ct. 289 (1914).

The purpose of the second sentence of Paragraph 10 of the Judgment of Absolute Divorce is to deny Appellant a fresh start from the obligation created in the first sentence of Paragraph 10 of the Judgment of Absolute Divorce.

Appellant relied upon the appellate Courts to reinstate the rights Congress has given her under federal bankruptcy law by filing a bankruptcy petition one month after the Judgment of Absolute Divorce was entered by the trial court. The Michigan Court of Appeals and the Michigan Supreme Court have failed to reinstate her rights.

4. "It is, of course, clear that on due process grounds, no judge can compel a settlement prior to trial on terms which one or both parties find completely unacceptable." In Re La Marre, 494 F. 2d 753, 756 (1974). The due process clause of the Fourteenth Amendment requires that parties whose rights will be affected are entitled to a hearing. Fuentes v Shevin, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, 10 UCCRS 913 (1972), reh den 409 U.S. 902, 34 L. Ed. 2d 165, 93 S. Ct. 177. To compel a party to be bound to a settlement that she has not agreed to deprives her of her right to be heard on the issues involved in the case.

However, where there is a dispute concering the agreement of a party to an alleged settlement, that party also

has a right to be heard on the issue of whether she agreed to the alleged settlement. Denying her that right is a second deprivation of due process. The right to a hearing under the due process clause includes the right to introduce evidence. Baltimore & O.R. Co. v United States, 298 U.S. 349, 80 L. Ed. 1209, 56 S. Ct. 797 (1935). In the instant case, Appellant has been deprived of her right to a hearing and a right to present evidence that she did not agree to the terms of the judgment. The trial court made no findings of fact that the terms of the judgment had been agreed to by both parties.

The Michigan Court of Appeals did make findings of fact that Appellant agreed to the terms of the judgment. However, with the Court of Appeals

acting as the trial court, there was no state appellate court that Appellant could appeal to by right. An appeal cannot be granted to some litigants and arbritarily denied to others. Lindsey v Normet, 45 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972).

More importantly, the Michigan Court of Appeals made findings of fact that Appellant agreed to the terms of the judgment solely upon a review of the mediation transcript. The Michigan Court of Appeals, as well as the trial court, deprived Appellant of her right to be heard and to present evidence that she did not agree to the terms of the judgment.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the decision below.

In the alternative, the Court should note probable jurisdiction of this appeal to set it down for plenary briefing and argument.

Respectfully submitted.

Theresa F. Mitan
Appellant, Pro Se.

September, 1988